82-459

No. ———

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WALTER PARCINSKI,
Petitioner,

v.

THE OUTLET COMPANY, INC., and
THE EDWARD MALLEY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH D. GARRISON
JANET BOND ARTERTON
GARRISON, KAHN, CRANE & SILBERT
405 Orange Street
New Haven, Conn. 06511

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a plaintiff who alleges that he was denied a job because of his age, in violation of the Age Discrimination in Employment Act of 1967, establishes a prima facie case of age discrimination, sufficient to entitle him to submission to the jury, by introducing evidence *inter alia* that (1) he is within the age group (40-70) protected by the ADEA; (2) he applied for a vacant job for which he was qualified; (3) he was rejected; and (4) the job was awarded to a younger employee who was less qualified.

2. Whether, when a plaintiff in an ADEA case has introduced evidence establishing a prima facie case, and the employer introduces testimony that legitimate reasons motivated the decision, a plaintiff who fails to specifically rebut the employer's proffered reasons is nonetheless entitled to have the case submitted to the jury so that the jury may determine the credibility of the witnesses proffering the employer's reasons, and, if it disbelieves them and credits the plaintiff's evidence, return a verdict for the plaintiff on the basis of the inferences flowing from the evidence establishing the plaintiff's prima facie case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	16

APPENDICES

A—Opinion of Court of Appeals	App. 1a
B—Judgment of District Court	App. 7a
C—Order of District Court Denying Motion for Judgment N.O.V.	App. 8a
D—Order Extending Time To File Petition for Certiorari	App. 9a
E—Order Further Extending Time To File Petition for Certiorari	App. 10a

TABLE OF CITATIONS

Cases: Page

Aikens v. United States Postal Service, 665 F.2d 1057 (D.C. Cir. 1981) 11, 12-13
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 10
Brown v. Eckerd Drugs, Inc., 663 F.2d 1268 (4th Cir. 1981) 16
Franks v. Bowman Transp. Co., 424 U.S. 747 10
Furnco Construction Co. v. Waters, 438 U.S. 567 10
Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980), cert. denied, 451 U.S. 945 ..... 10, 13
Johnson v. Lehman, 679 F.2d 918 (D.C. Cir. 1982) 10
Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 10
Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) 10
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 10
Lorillard v. Pons, 434 U.S. 575 10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 ..... 10, 12
Pullman-Standard v. Swint, —— U.S. ——, 102 S.Ct. 1781 ..... 12, 14-15
Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982) 11, 14
Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979) 10
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980) 10
Smithers v. Bailer, 629 F.2d 892 (3rd Cir. 1980) 10
Spagnuolo v. Whirpool Corp., 641 F.2d 1109 (4th Cir. 1981) 11, 16
Ste. Marie v. Eastern R. Ass'n, 650 F.2d 395 (2nd Cir. 1981) 11, 13, 16
Sutton v. Atlantic Richfield Co., 646 F.2d 407 9th Cir. 1981) 10
Teamsters v. United States, 431 U.S. 324 10
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 ..... 10, 13

TABLE OF CITATIONS—Continued

Page

Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982), pet. for cert. pending, No. 81-2202 ..... 10, 11, 16
United Air Lines, Inc. v. McMann, 434 U.S. 192 .. 6
United States Postal Service v. Aikens, No. 81-1044, cert. gr. 3/22/81 ..... 11, 12-13
Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), cert. denied, 102 S.Ct. 1429 10

Statutes:

Age Discrimination in Employment Act of 1967:
Sec. 4(a)(1), 29 U.S.C. § 623(a)(1) ..... *passim*
Sec. 4(f)(2), 29 U.S.C. § 623(f)(2) 5
Sec. 7(b), 29 U.S.C. § 626(b) 7
Sec. 12(a), 29 U.S.C. § 631(a) ..... *passim*
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. ..... *passim*

Miscellaneous:

29 C.F.R. § 860.120(a) 6
29 C.F.R. § 1625.7 6
Brief for Petitioner in *United States Postal Service* v. *Aikens*, No. 81-1044 13
Note, The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act, 88 Yale L.J. 565 (1979) 6
Petition for Certiorari in *Westinghouse Elec. Corp.* v. *Tribble*, No. 81-2202 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. ———

WALTER PARCINSKI,

Petitioner,

v.

THE OUTLET COMPANY, INC., and
THE EDWARD MALLEY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Walter Parcinski, Petitioner, respectfully petitions this Court to grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 22, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported at 673 F.2d 34, is reprinted in the Appendix as Appendix A. The judgment of the United States District Court for the District of Connecticut, entered following the jury verdict, is unreported, and is reprinted as Appendix B. The order of the District Court denying Respondents' Motion for Judgment N.O.V. is unreported, and is reprinted as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 22, 1982. A timely Petition For Rehearing and Suggestion For Rehearing Banc was denied on April 19, 1982. On July 9, 1982, Justice Powell signed an order extending the time for filing a petition for a writ of certiorari to and including August 17, 1982 (Appendix D). On August 12, 1982, Justice Marshall signed an order further extending the time for filing a petition for a writ of certiorari to and including September 16, 1982 (Appendix E). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et. seq.*, are as follows:

Section 4(a)(1), 29 U.S.C. § 623(a)(1):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 12(a), 29 U.S.C. § 631(a):

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

In this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the jury returned a verdict for the plaintiff (Petitioner), but the Court of Appeals overturned that verdict and directed that the complaint be dismissed. In this posture, the evidence must be viewed in the light most favorable to Petitioner, and our statement proceeds accordingly.

In June 1977, Respondent Edward Malley Company, which owned and operated a department store in New Haven, Connecticut, was purchased by Respondent Outlet Company, a firm based in Providence, Rhode Island that already owned and operated seven department stores. At the time of the purchase, Petitioner was 63 years old, and had been a buyer with Malley for 32 years, many of them as the buyer for the housewares department.

Upon acquiring Malley, Outlet restructured certain jobs at the Malley store with the goal of reducing employment costs. As Outlet had a centralized corps of buyers in Providence—who purchased for all of Outlet's stores—Outlet decided to eliminate all buyer and assistant buyer positions at Malley, thereby abolishing Petitioner's job. However, as the buyers at Malley had, in addition to their purchasing duties, supervised other store employees in their respective departments, Outlet decided to create a smaller number of "department manager" positions at the Malley store to carry on that supervisory function. Outlet decided to staff the new department manager positions with some of the Malley employees whose jobs were being abolished, and to discharge the remainder of the Malley buyers and assistant buyers.

Prior to deciding which employees to keep as department managers, a Vice President of Outlet met with Alfred Seigle, the merchandise manager of Malley (who had supervised many of the buyers and assistant buyers), to secure Seigle's assessment of the "relative merits" of the Malley buyers. Seigle identified five individuals, including Petitioner, as the "strongest buyers" at Malley, and recommended that those five be kept on in some capacity. Despite this recommendation, Outlet's officials decided to give the position of manager of the housewares department to another employee who was in his late 30's or early 40's and had been the buyer in another department. The latter had not been among the five identified by Seigle as the "strongest buyers", and had no prior

experience in the housewares department. Seigle testified that there was "no comparison" between Petitioner and the employee selected in terms of qualification for the new position of manager of the housewares department—Petitioner was the better qualified in every respect: supervisory ability, administrative ability, and knowledge of the merchandise sold in that department.

Respondents offered no evidence—nor did they claim—that the employee selected was better qualified than, or even as qualified as, Petitioner for the position. At the time Outlet's officials made their choice, Outlet's President, Levon Charleson (who prior to 1970 had been a Malley official for fifteen years and thus had come to know Petitioner's work well), knew that Petitioner was a "very good" employee. Outlet's officials also knew, at the time they made the choice, that Petitioner was 63 years old, and that under the existing pension plan he would become eligible to retire with a pension if, but only if, his employment continued until age 65.

On June 24, 1977, Charleson told Petitioner that his employment was being terminated effective that day. Petitioner expressed shock; termination meant that he would not qualify for a pension despite 32 years' service.[1] He asked whether there was some other job to which he might be assigned. Charleson responded that there was not, and that Petitioner "could use his severance pay in lieu of the pension." Charleson told Petitioner that it was "just too expensive to carry" Petitioner in a department manager position. Charleson promised, however, that if a buyer position opened up in Providence for which Petitioner was qualified, he would be given preference in fill-

[1] Petitioner testified that he had intended to retire in 1980, three years after Outlet's acquisition of Malley. He further testified—and the former President of Malley confirmed—that in 1973 Petitioner had received a job offer from a rival department store at a higher salary, but had been dissuaded from accepting it when the Malley President pointed out that Petitioner's higher salary would not equal in value the pension he would obtain by remaining with Malley.

ing that position. (All of the Malley buyers who were terminated on that date were given a similar assurance.)

The decision by Outlet management not to retain Petitioner was paralleled in the filling of the other department manager positions. In general, the department manager positions were offered to the assistant buyers and the younger buyers, while the older, more senior buyers were terminated.

In December 1978, Outlet's housewares buyer in Providence was forced to retire because of illness. Despite Outlet's prior promise to Petitioner of preferred consideration, and despite Outlet's knowledge—admitted at trial—that Petitioner was a "very good" buyer of housewares who had experience virtually identical to that of the incumbent who was retiring, Petitioner was not offered the position. Instead, the position was awarded to a buyer working for another company, who was much younger than Petitioner. Outlet offered no evidence—nor did it claim—that the person selected was better qualified, or even as qualified, as Petitioner. The selectee held the buyer's job for only a few months, after which it again became vacant. Once again, the position was not offered to Petitioner. (In contrast to the treatment accorded Petitioner, two former Malley buyers in their 30's *were* offered buyer positions in Providence when vacancies arose there).

Petitioner then brought the instant action, alleging that Outlet had bypassed him because of his age (in particular, to avoid the cost of the pension for which Petitioner would have become eligible had he worked another two years and attained age 65 while still in Respondents' employ),[2] both in selecting a younger and less qualified person for the department manager position in 1977, and

---

[2] Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), makes explicit that the higher pension cost associated with employment

in selecting younger and less qualified persons to fill the housewares buyer position in Providence when it became vacant in 1978 and 1979.

At the trial, which was to a jury, the evidence recited above was introduced. In rebuttal, officials of Outlet testified as to their reasons for not selecting Petitioner for these positions. Outlet's President Charleson, when asked by Respondents' counsel whether age had been "a determining factor in your decision," responded initially: "Not truly." None of Outlet's witnesses claimed that the persons actually selected were as qualified or better qualified than Petitioner. Rather, they furnished the following explanations for their decisions:

(1) Petitioner was not hired for the newly created department manager position at the Malley store because department managers were to receive a much lower salary than Petitioner had been receiving as a buyer, and Outlet's officials believed that there might be morale problems if employees were retained at substantially reduced salaries; accordingly, the positions were awarded to employees whose prior salaries had been commensurate with that of the new job.

(2) The decision to select others for the buyer position in Providence reflected a decision, made coincident with the retirement of the incumbent buyer, to change the type of housewares marketed by Outlet from "basic" to

---

of an older worker is not a permissible basis for rejecting that worker:

> [N]o [bona fide] employee benefit plan shall excuse the failure to hire any individual . . . .

As this Court explained in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 202, Congress intended "that the existence of such plans could not be used as an excuse not to hire any person because of age." See also, 29 C.F.R. §§ 860.120(a), 1625.7; Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 Yale L.J. 565, 585 n. 90 (1979).

"gourmet." Petitioner was fully qualified to buy the type of merchandise previously marketed, but Petitioner had no experience purchasing housewares of the different type now contemplated. On cross-examination, however, Outlet's President admitted that the younger person actually selected for the buyer position had, in his prior buyer position with another company, been purchasing the same type of housewares as Petitioner.

The district court submitted the case to the jury, instructing that plaintiff had the burden of proving by a preponderance of the evidence that one or more of the decisions about which he complained had been motivated by age. The jury returned a verdict in Petitioner's favor of $93,500. By special interrogatory, the jury found that the age discrimination was willful; the district court therefore awarded an additional equal sum as liquidated damages pursuant to 29 U.S.C. § 626(b).

Respondents filed a motion for judgment n.o.v, contending that Respondents had introduced evidence that they had been motivated by factors other than age and Petitioner had not thereafter introduced any evidence that specifically demonstrated those explanations to have been pretexts. Respondents' counsel argued, in support of the motion:

> In order for us to be found guilty of age discrimination, for that [evidence] to be considered pretextual there should be some evidence put on by plaintiff to rebut our presentation of the reasonableness [of the decisions.]
>
> • • • •
>
> That evidence which we put on to defend the claim was not rebutted in this lawsuit, and therefore our defense to the claim is not pretextual.

The district court, from the bench, disagreed:

> Suppose the jury didn't believe your evidence . . .
>
> • • • •

> The jury has, and they are charged constantly, to make a decision as to whether they're going to believe all or part of any witness' testimony. Now I don't believe, and I don't know of any authority that says it, if that testimony isn't contradicted by other testimony they can't reach the issue of credibility.
>
> * * * *
>
> [C]redibility is peculiarly a matter for the jury to determine.[3]

The court subsequently entered an order denying the motion for judgment n.o.v. "for the reasons stated in open court" (App. 8a), and entered judgment for plaintiff (App. 7a).

Respondents appealed, contending that the district court erred in failing to grant their motion for judgment n.o.v. for two reasons: (1) Petitioner's evidence did not establish a prima facie case of age discrimination; and (2) even if it did, Respondents' witnesses' testimony that they were motivated by legitimate reasons was "uncontradicted" and thus those reasons could not be found to be pretextual.[4]

The Court of Appeals for the Second Circuit reversed, "[b]ecause our review of the record satisfies us that plaintiff has not established that he was discharged because of his age," (App. 3a). The court stated that "the record herein is utterly devoid of any proof of discriminatory motivation on the part of appellants," *id.*

---

[3] Ironically, Respondents' counsel had made the very same point in his closing argument to the jury. Noting that the outcome turned on whether Respondents had acted on the basis of age or on the basis of legitimate considerations, and that Outlet's President had testified to the latter, counsel argued:

> Believe him or don't believe him. You saw him. That's up to you. You are the triers of the fact.

[4] Respondents also appealed on a time limits ground that the Court of Appeals did not reach. App. 3a.

at 6a. Additionally, with respect to the filling of the department manager position, the court stated that the reason for bypassing Petitioner proffered by Respondents' witnesses—that they feared morale problems if employees were retained in positions of reduced salary and responsibility—was "not pretextual":

> Assuming that there were lower echelon, poorer paying jobs in the restructured enterprise which buyers were qualified to fill, Outlet would be met with serious morale problems arising out of the substantial reductions in responsibilities and salaries that would accompany such moves. These were matters of concern for Outlet, not pretextual arguments. [*Id.* at 5a-6a.]

REASONS FOR GRANTING THE WRIT

Introduction

In this case, a claim of disparate treatment based on age under the Age Discrimination in Employment Act of 1967 (the "ADEA") was submitted to a jury on unchallenged instructions, and the jury returned a verdict for the plaintiff. The court below overturned that verdict and directed entry of judgment for defendants. The court below based that decision on two independent grounds each of which merits review by this Court. First, the court determined that the plaintiff had failed to introduce evidence sufficient to support an inference of disparate treatment on the basis of age, and thus was not entitled to have his claim submitted to a jury, although plaintiff's evidence more than satisfied the requirements for a prima facie case as defined by other Circuits. Second, the court determined that, the defendants having presented in their case live testimony as to a legitimate reason for their failure to continue to employ the plaintiff, and the plaintiff not having introduced evidence specifically rebutting that testimony, the reason given by the defendants for their actions must be taken as true

and "not pretextual"—thereby disposing *as a matter of law* of the critical issue of motivation in the teeth of a jury determination rejecting the credibility of the defendants' testimony.

To understand the significance of these rulings, it is necessary to recall that "[t]he prohibitions of the ADEA were derived *in haec verba* from Title VII [of the Civil Rights Act of 1964]." *Lorillard v. Pons*, 434 U.S. 575, 584. The ADEA prohibits disparate treatment on the basis of age just as Title VII does disparate treatment on the basis of race, sex, religion and national origin. Unlike Title VII, claims under the ADEA are subject to jury trial, *Lorillard, supra*, but the lower courts nonetheless uniformly have concluded—as did the court below in this case—that the methodology for proving claims of disparate treatment under Title VII, enunciated by this Court in a line of cases from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, through *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248,[5] is applicable to such claims under the ADEA.[6]

---

[5] See also *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24; *Furnco Construction Co. v. Waters*, 438 U.S. 567; *Teamsters v. United States*, 431 U.S. 324; *Franks v. Bowman Transp. Co.*, 424 U.S. 747.

[6] See, e.g., *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-19 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945; *Smithers v. Bailar*, 629 F.2d 892 (2rd Cir. 1980); *Smith v. University of North Carolina*, 632 F.2d 316, 334-337 (4th Cir. 1980); *Williams v. General Motors Corp.*, 656 F.2d 120, 127-128 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1429; *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, (7th Cir. 1980), *cert. denied*, 450 U.S. 959; *Tribble v. Westinghouse Electric Corp.*, 669 F.2d 1193 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202; *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981); *Schwager v. Sun Oil Co.*, 591 F.2d 58 (10th Cir. 1979); *Johnson v. Lehman*, 679 F.2d 918 (D.C. Cir. 1982).

As to the first issue decided by the court below, this Court already has before it in *United States Postal Service v. Aikens*, No. 81-1044, certiorari granted March 22, 1982, the question of what is necessary to prove a prima facie case of disparate treatment. The decision of the court below in this case is in direct conflict with the decision on review in *Aikens* (*Aikens v. United States Postal Service*, 665 F.2d 1097 (D.C. Cir. 1981)), where on evidence significantly less compelling than here—particularly, in the absence of evidence that the plaintiff was better qualified than the person selected for the job (evidence that the plaintiff here *did* introduce)—the District of Columbia Circuit found a prima facie case to have been established.

There is a square conflict between the circuits as to the proper resolution of the second issue decided by the court below. The court below has held that, in the context of disparate treatment litigation, the mere introduction of testimony by the defendant of an innocent motivation "negates" as a matter of law any inference of discrimination that might have been created by the evidence introduced in support of the plaintiff's prima facie case—irrespective of whether the fact finder would have credited the defendant's testimony.[7] The Fifth Circuit has ruled similarly,[8] but the Fourth and Eighth Circuits have ruled to the contrary.[9] And the rulings of the court below on this issue, and the similar ruling of the Fifth Circuit, by interposing a rule of law that usurps the fact-finder's prerogative to disbelieve the defendant's

---

[7] In addition to the instant case, see *Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 399 (2nd Cir. 1981).

[8] *Reeves v. General Foods Corp.*, 682 F.2d 515, 521-523, n. 11 (5th Cir. 1982).

[9] *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981); *Tribble v. Westinghouse Elec. Corp.*, 669 F. 1193, 1196 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202.

testimony, are inconsistent with principles established by this Court in *Pullman-Standard v. Swint*, —— U.S. ——, 102 S.Ct. 1781.

Discussion

1. In *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802, this Court set out a four-factor approach to proving a prima facie case of disparate treatment:

> The complainant in a Title VII trial [may] carry the initial burden under the statute of establishing a prima facie case of racial discrimination * * * * by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Here, as in *Aikens*, the fourth factor of the *McDonnell Douglas* test does not precisely fit because rejection of the plaintiff occurred simultaneously with the selection of other applicants. In *Aikens*, the court of appeals found that a prima facie case was established even though the plaintiff did not prove that he was as qualified or better qualified than the applicants selected to fill the job. Whether the absence of such proof should be fatal to the plaintiff's claim is at issue before this Court in *Aikens*. Unlike *Aikens*, in the instant case the plaintiff proved, in addition to all of the other elements set forth in *McDonnell Douglas*, that he was more qualified than the younger persons selected to fill the jobs he sought.

If this Court were to affirm the court of appeals in *Aikens*, it would follow *a fortiori* that the decision below in the instant case should be reversed. If this court were to reverse in *Aikens*, it may well do so on a rationale that still would require reversal in the instant case.[10] It

[10] The Postal Service in its brief to this Court in *Aikens* contends that the fatal flaw in the plaintiff's case there is the failure

is our submission that on any analysis the plaintiff here introduced more than sufficient evidence to permit a jury to find that it was "more likely than not" that he was the victim of discrimination on the basis of his age.

2. The court below had an alternative basis for concluding that the case should not have gone to the jury on plaintiff's claim of discrimination in the filling of the department manager position: that, as a matter of law, the reason testified to by the employer's officials for preferring the younger, less qualified candidate was "not pretextual." The jury obviously did not credit that testimony, and the decision below thus is the most recent in a line of Second Circuit decisions that hold *as a matter of law* that a plaintiff, even if he has introduced evidence sufficient to establish a prima facie case, cannot prevail absent evidence specifically rebutting the employer's testimony of an innocent explanation.

The rule in the Second Circuit is that when an employer introduces testimony that it was motivated by legitimate reasons those reasons are "presumptively valid," *Geller v. Markham*, 635 F.2d 1027, 1032 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), and a plaintiff cannot thereafter prevail merely on the strength of the evidence that established the *prima facie* case. As Judge Friendly put it in *Ste. Marie v. Eastern R. Ass'n.*, 650 F.2d 395, 399 (2nd Cir. 1981), an employer "sufficiently rebuts a prima facie case by pointing to a business reason for his employment decision," and, absent additional and more specific evidence from plaintiff, "negates . . . the force of a plaintiff's initial showing that a qualified minority employee was denied employment or promotion which was given to a majority employee instead." The Fifth Circuit has adopted a similar

---

to show "that he was better qualified than the successful applicants." Postal Service Brief at 22. As discussed in text, the plaintiff in the instant case made such a showing.

rule. *Reeves v. General Foods Corp.*, 682 F.2d 515, 521-523 and n. 11 (1982). The rule of decision below on this issue is in direct conflict with decisions of the Fourth and Eighth Circuits (see pp. 15-16, *infra*), and is inconsistent with principles announced by this Court in *Pullman-Standard v. Swint*, —— U.S. ——, 101 S.Ct. 1781.

The flaw in the Second Circuit's rule is that it leaves no room for the possibility that the trier of fact may disbelieve the testimony that constitutes the sole evidence of the employer's supposed "innocent" reason. The plaintiff, by introducing evidence that is sufficient to establish a prima facie case, has shown, if that evidence is credited, that as the record then stands it is "more likely than not" that the decision was based on impermissible factors. Under the usual principles that inform our legal system—in which credibility determinations are made by the trier of fact (judge or jury) that has observed the demeanor of the witnesses—the plaintiff's showing is not "negated" *as a matter of law* because the defendant introduces testimony that points the other way; rather, it is for the trier of fact to determine *as a matter of fact* whether the defendant's testimony is credible. By taking that responsibility from the fact-finder, and holding that as a matter of law the defendant's testimony "negates the force of a plaintiff's initial showing," the Second Circuit has acted inconsistently with the principle stated by this Court in *Pullman-Standard*, 102 S.Ct. at 1790:

> [U]nder § 703(h) [of Title VII], discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts, to see if they satisfy some legal concept of discriminatory intent.

Nothing in *Burdine* suggests that discriminatory intent is any less a question of fact under § 703(a)—Title VII's counterpart to § 4(a)(1) of the ADEA—

and nothing in *Burdine* is inconsistent with the principle stated in *Pullman-Standard*. The Court in *Burdine* required that an employer's supposed innocent reasons for rejecting the plaintiff be set forth "through the introduction of admissible evidence," 450 U.S. at 255, and added:

> An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden [of production] merely through an answer to the complaint or by argument of counsel. [*Id.* at 255, n.9].

In this manner, the Court assured that the employer's evidence would be exposed to the usual crucible of fact-finding, in which the plaintiff can prevail if the fact-finder concludes "that the employer's proffered explanation is unworthy of credence," *id.* at 256. The defendant's introduction of evidence "raises a genuine issue of fact as to whether it discriminated against the plaintiff," *id.* at 254-255, and "would *allow* the trier of fact . . . to conclude that the employment decision had not been motivated by discriminatory animus," *id.* at 257 (emphasis added).

In contrast to the Second and Fifth Circuits, the Fourth and Eighth Circuits have correctly understood that a jury finding in favor of plaintiff in an ADEA case cannot be reversed on appeal even though the plaintiff's evidence consisted solely of that necessary to establish the prima facie case [11] and even though the defendant called

---

[11] In the instant case, Petitioner introduced evidence going beyond the requisites of a prima facie case that also pointed to the pretextual nature of Respondents' "morale" justification. Thus, for example, he showed that contemporaneously Respondents had made inquiries to determine the "relative merits" of all the buyers; that Respondents welched on their promise to give him preferred consideration for other positions that arose; and that Respondents' sole purpose in reorganizing the Malley jobs was to achieve labor savings—a goal with which his ascension to pension eligibility would conflict.

witnesses who testified that the decision was actuated by legitimate considerations. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981);[12] *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202.[13]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH D. GARRISON
JANET BOND ARTERTON
GARRISON, KAHN, CRANE & SILBERT
405 Orange Street
New Haven, Conn. 06511

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Petitioner

---

[12] See also *Brown v. Eckered Drugs, Inc.*, 663 F.2d 1268, 1272, 1274 (4th Cir. 1981) (same holding under Title VII); but *cf. id.* at 1279-80 (Russell, J., dissenting, urging adoption of Judge Friendly's contrary holding in *Ste. Marie, supra*).

[13] The petition for certiorari in *Tribble* states, as the second question presented:

> In light of the discrimination cases previously decided by this Court, culminating in *Texas Department of Community Affairs v.* Burdine, did the Eighth Circuit err in holding that there was evidence of discrimination where the employer produced evidence of legitimate, nondiscriminatory reasons for its actions, and there was no direct evidence of discrimination and no evidence of pretext?

Petition for Certiorari, No. 81-2202, at p. i. See also, *id.* at 10-11.